UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	Civil No: 99 1018
	)	Judge Gladys Kessler
	)	Filed: April 26, 1999
IMETAL,	)	
DBK MINERALS, INC.,	)	
ENGLISH CHINA CLAYS, PLC, and	)	
ENGLISH CHINA CLAYS, INC.,	)	
Defendants.	)	
_____	)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On April 26, 1999, the United States filed a civil antitrust Complaint alleging that the proposed acquisition of English China Clays, plc ("ECC") by IMETAL ("Imetal") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, with respect to four relevant products. The Complaint alleges that Imetal and ECC are two of five U.S. producers of water-washed kaolin; two of four U.S. producers of calcined kaolin for use in paper-making; the only two producers in the

Southeastern United States of ground calcium carbonate (“GCC”) in slurry form for the paper industry ("paper-grade GCC"); and the two leading U.S. producers of fused silica. The request for relief seeks: (1) a judgment that the proposed merger would violate Section 7 of the Clayton Act; (2) injunctive relief preventing consummation of the proposed acquisition; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

When the Complaint was filed, the United States also filed a proposed Final Judgment and a Hold Separate Stipulation and Order that would settle the lawsuit. The proposed settlement permits Imetal to acquire ECC, but requires divestitures that will preserve competition in the four relevant product markets alleged in the Complaint. The proposed Final Judgment orders defendants to divest production facilities and associated assets, as defined in the proposed Final Judgment, for water-washed kaolin, calcined kaolin, and fused silica, to divest Imetal's interest in Alabama Carbonates, L.P., a joint venture that makes paper-grade GCC, and to divest substantial GCC reserves. Defendants must accomplish these divestitures within one hundred and eighty (180) calendar days after the filing of the proposed Final Judgment in this matter, or five (5) days after notice of the entry of the proposed Final Judgment by the Court, whichever is later, to purchasers acceptable to the Antitrust Division of the United States Department of Justice ("DOJ"). If the defendants do not do so within the time frame in the proposed Final Judgment, a trustee appointed by the Court would be empowered for an additional six months to sell those assets. If the trustee is unable to do so in that time, the Court could enter such orders as it shall deem appropriate to carry out the purpose of the trust which may, if necessary, include extending the trust and the trustee’s appointment by a period requested by the United States.

In addition, under the terms of the Hold Separate Stipulation and Order, defendants must hold specified assets to be divested separate and apart from their other businesses until the required divestitures have been accomplished. Defendants must, until the required divestitures are accomplished, preserve and maintain the specified assets to be divested as saleable and economically viable ongoing concerns.

The plaintiff and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Imetal is a French corporation with headquarters in Paris, France. It produces building materials, industrial metals, and industrial minerals worldwide. In the United States, Imetal produces kaolin through its DBK Minerals, Inc. subsidiary ("DBK") at a plant in Dry Branch, Georgia and at a plant in Jeffersonville, Georgia; dry-processed GCC through The Georgia Marble Company ("Georgia Marble"), a subsidiary of DBK, at a number of locations throughout the United States, including its plant in Sylacauga, Alabama; paper-grade GCC through a joint venture, Alabama Carbonates, L.P., in Sylacauga, Alabama, in which Georgia Marble has a 50 percent ownership interest; and fused silica, through its C-E Minerals, Inc. subsidiary at a plant in Greeneville, Tennessee. In 1997, Imetal reported total sales in excess of 10 billion French francs.

ECC is a United Kingdom Corporation with headquarters in Reading, England. It produces industrial minerals, pigments and chemicals worldwide. In the United States, ECC produces kaolin through its English China Clays, Inc. subsidiary at two plants in Sandersville, Georgia and at a plant in Wrens, Georgia; and paper-grade GCC at a plant in Sylacauga, Alabama and at plants in Maryland and Wisconsin. In addition, in 1998, ECC purchased Minco Acquisition Corporation, a company that produces fused silica and fused magnesia at plants in Midway, Tennessee. In 1997, ECC reported total sales of about 850 million pounds Sterling.

On January 11, 1999, Imetal announced a cash tender offer for all of the shares of ECC. This transaction, which would increase concentration in the already highly concentrated markets for water-washed kaolin clay, calcined kaolin clay and fused silica in the United States, and would increase concentration in the already highly concentrated market for paper-grade GCC in the Southeastern United States, precipitated the government's suit.[1]

B. The Markets

Water-Washed Kaolin

Kaolin is a clay consisting of a crystalline hydrated aluminum silicate, usually found as the mineral kaolinite. The clay is mined in open pit quarries, and processed using crushing and grinding equipment. Water-washed kaolin is treated with water and flotation, which removes impurities and separates the kaolin by particle size. It is sold in a number of different grades, differentiated generally by particle size and brightness.

[1]On April 27, 1999, Imetal consummated its cash tender offer, subject to the terms of the proposed settlement filed in this case.

The vast majority of water-washed kaolin is used in paper-making, both as a pigment in coating formulations and as a filler in the body of paper. In coating formulations, kaolin is typically used in conjunction with other pigments, such as GCC. The kaolin has unique properties, however, and the other pigments are typically used as a complement, rather than a replacement, for water-washed kaolin. Kaolin is used as a filler primarily in paper that is made using an acid process, where calcium carbonate fillers cannot generally be used.

Thus, for many paper companies, no good substitute exists for water-washed kaolin. A small but significant increase in the price of water-washed kaolin would not cause a significant number of paper customers currently purchasing water-washed kaolin to substitute other products.

Much of the world's highest quality kaolin deposits are found in a relatively small area in Georgia. All of the U.S. producers of water-washed kaolin are located in Georgia, and sell products from their plants in Georgia throughout the United States.

Calcined Kaolin

Calcined kaolin is water-washed kaolin that has been further processed by calcining or baking at a temperature of about 1000 degrees Centigrade under controlled conditions. The high temperature alters the structure of the water-washed kaolin, resulting in a whiter and brighter kaolin that has a higher refractive index. Because of its higher brightness, calcined kaolin is used in paper-making applications that require greater opacity than that provided by water-washed kaolin. Calcined kaolin costs more than twice as much as regular water-washed kaolin.

For many paper customers, no good substitute exists for calcined kaolin. A small but significant increase in the price of calcined kaolin would not cause a significant number of paper customers currently purchasing calcined kaolin to substitute other products.

All of the U.S. producers of calcined kaolin for paper-making are located in Georgia, and sell their products from plants in Georgia to paper companies throughout the United States.

GCC for Paper Coating Applications

Natural calcium carbonate is typically found in the ground in marble or limestone deposits. The stone is quarried and then processed through a series of screening and dry grinding steps into particles of various sizes, ranging down to about two (2) microns. The dry-processed GCC can also be further ground using a wet-grinding process into particle sizes as small as one (1) micron or less. GCC varies in color depending on the reserves from which it is quarried. The purest GCC comes from calcitic marble deposits. These high bright deposits are scarce, and some of the finest high bright deposits are located in the Sylacauga, Alabama area.

Paper-making requires the brightest white GCC. The vast majority of GCC sold for paper-making is wet-processed and sold in slurry form. Most of the GCC consumed in paper-making is used for coating applications. Precipitated calcium carbonate (PCC) is also used in paper-making, but most PCC used in paper-making is used as filler. GCC is preferred over PCC in coating applications because of its runnability, higher printability and gloss.

A small but significant increase in the price of GCC would not cause a significant number of paper customers currently purchasing GCC for coating applications to substitute other products.

Paper-grade GCC, unlike water-washed and calcined kaolin, is produced in a number of locations throughout the United States. Because of high transportation costs, sales of GCC tend to be regional rather than nationwide.

Fused Silica

Fused silica is formed by melting pure non-crystalline silicon dioxide at high temperatures. This process creates a material with a low coefficient of thermal expansion which improves resistance to extreme heat, corrosion, abrasion, and electrical non-conductivity. Fused silica is used in sophisticated applications such as investment castings and epoxy molding compounds used in the electronics industry, as well as in refractory applications.

There are no economical substitutes for fused silica. A small but significant increase in the price of fused silica would not cause a significant number of current fused silica customers to substitute other products. Domestic producers of fused silica generally have a single plant, and sell their products throughout the United States.

C. Harm to Competition as a Result of the Proposed Transaction

Water-washed Kaolin

Imetal and ECC compete with each other in the development, production and sale of water-washed kaolin in the United States -- a market which is now highly concentrated and would become substantially more concentrated as a result of the proposed acquisition. There are only five U.S. producers of water-washed kaolin. ECC is the largest, and Imetal is the third largest. The proposed transaction would reduce the number of firms making water-washed kaolin to four and create a single firm with well over 50% of domestic production capacity. The acquisition would consolidate the industry into two large players -- the combined Imetal/ECC and

Engelhard Corp. -- and two relatively small players -- Thiele Kaolin Company and J.M. Huber. It would eliminate the direct competition between Imetal and ECC that has benefited consumers, and likely lead to higher prices through increased opportunities for coordination and from the elimination of a significant competitor in an oligopolistic market.

Moreover, new entry into the development, production and sale of water-washed kaolin is unlikely to occur and unlikely to be timely or sufficient to defeat a post-acquisition price increase. Building a water-washed kaolin plant could cost $100 million or more and take a minimum of two years. In addition, entry into the production of water-washed kaolin would require the location, testing and acquisition of substantial kaolin reserves to justify the investment in the plant.

Calcined Kaolin

The market for calcined kaolin for paper-making is even more concentrated than is the market for water-washed kaolin. There are only four producers, and ECC and Imetal are the second and third largest, respectively. (Engelhard is the industry leader and Thiele is the smallest participant.) The proposed transaction would reduce the number of firms making calcined kaolin for paper-making to only three, eliminating the direct competition between Imetal and ECC that has benefited consumers. The acquisition would likely lead to higher prices for calcined kaolin for paper-making.

New entry is unlikely to occur and would not be timely or sufficient to defeat a post-acquisition price increase. To be an effective competitor, any new entrant would require at least two calciners with substantial capacity (estimated at 85,000 to 100,000 tons annually) in order to be able to supply large paper customers' requirements and to be considered a credible source. Construction of a single calciner (with the necessary attendant infrastructure) could cost a

minimum of $30 million and require at least two years, sometimes much longer, for permitting and construction. In addition, any entrant not already in the water-washed kaolin business would also face the barriers to entry into that business.

GCC for Paper Coating

There are only four firms that make paper-grade GCC in the United States: Omya, Inc., ECC, Alabama Carbonates, and Columbia River Carbonates (in Washington State). Only two of these firms are located in the Southeastern United States. One is ECC and the other is Alabama Carbonates, which is a joint venture owned 50% by Omya and 50% by Imetal's Georgia Marble. Both are in Sylacauga, Alabama.

Imetal and ECC compete in the sale of paper-grade GCC in the Southeastern United States. ECC has substantial high bright reserves of GCC in the Sylacauga area, which it quarries and processes at its Sylacauga plant. The plant does both dry processing and wet processing, and sells wet-processed GCC in slurry form for use in paper-making. Georgia Marble has many hundreds of years of GCC reserves in the Sylacauga area, which it quarries and dry processes at its Sylacauga plant, across the street from the ECC plant. Georgia Marble does not have a wet processing plant, but it has a 50% interest in the Alabama Carbonates joint venture, which has a wet processing plant right next to the Georgia Marble facility.

Alabama Carbonates was formed as a joint venture between Georgia Marble and Omya in 1990 for the purpose of selling paper-grade GCC in thirteen states in the southeastern U.S. Under the terms of the joint venture, both Omya and Georgia Marble agreed to sell paper-grade GCC in

the designated area only through the joint venture.[2] Georgia Marble supplies the raw material which it quarries, crushes, washes, and dry processes into feedstock suitable for the wet processing plant at an agreed-upon price. Omya operates the wet-processing plant, sells the paper-grade GCC and collects a fee for these services.

Transport costs for GCC are high. As a result, GCC sales, unlike sales of water-washed and calcined kaolin, tend to be regional. ECC and Alabama Carbonates are the only companies that compete directly with each other for sales of paper-grade GCC in the Southeastern United States.

The proposed transaction would likely result in unilateral price increases to customers in the Southeastern United States. Entry is unlikely to occur, and would not be timely or sufficient to defeat a post-acquisition increase in the price of paper-grade GCC. The only other producer of paper-grade GCC is Omya, which would have no incentive to ship into the Southeast for the purpose of defeating its own price increase and, in any event, is barred from doing so by the terms of its joint venture agreement.[3] A de novo entrant would have to acquire substantial high bright reserves in the Southeast, establish a quarry and build a processing plant. While the quarry and plant would require considerable expenditures of money and take substantial time, the most significant barrier is obtaining appropriate reserves. Paper-grade GCC requires high bright reserves, which are a scarce resource and are generally believed to be largely unavailable in the Southeast because they are owned primarily by Georgia Marble and ECC. e

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[2]There is a limited exception in the joint venture agreement for certain pre-existing customers of the venturers.

[3]Columbia River Carbonates, the fourth producer of paper-grade GCC, is another joint venture in which Omya is a participant.

Fused Silica

Imetal and ECC are the two leading producers of fused silica in the United States. They account for more than 80% of domestic fused silica production, and more than 95% of the fused silica sold in the United States for investment castings. The two companies compete significantly with each other, and are each other's only meaningful competition in sales of fused silica for investment castings. The only other producer, Pemco, accounts for a tiny percentag of sales.

Imetal and ECC face competition from other domestic producers and from imports in sales of fused silica for refractories. Overall, however, according to the defendants' documents, the two firms account for almost two-thirds of total fused silica sales.

The proposed transaction would eliminate the direct competition between Imetal and ECC that has benefited consumers, and would create a single firm with a virtual monopoly in the sales of fused silica for investment castings and an overwhelming share of total domestic sales of fused silica. This concentration would likely result in unilateral price increases to consumers of fused silica.

Aluchem, Inc., an industrial minerals company, has announced plans to build a new plant in Alabama that will be capable of making fused silica. This planned entry by Aluchem, Inc. is not likely to be sufficient to deter an anticompetitive price increase, however. New entry is very difficult, time consuming and costly, and sufficient new entry is unlikely to occur and would not be timely or sufficient to defeat a post-acquisition fused silica price increase.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires substantial divestitures with respect to each of the products that is the subject of the Complaint. These divestitures are designed to ensure that the competition that would be eliminated by the proposed acquisition will be preserved and maintained. Under the terms of the proposed Final Judgment, defendants must accomplish these divestitures within one hundred and eighty (180) calendar days after the filing of that proposed Final Judgment, or five (5) days after notice of the entry of the proposed Final Judgment by the Court, whichever is later, to a purchaser acceptable to United States. If defendants fail to divest the assets within this period, a trustee, selected by the United States, will be appointed by the Court to sell the assets. Section VI of the proposed Final Judgment, which provides for the appointment of a trustee, contains a "Crown Jewel" provision that empowers the trustee to sell additional assets if necessary to effect certain of the divestitures.

If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if any divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

Kaolin

With respect to water-washed and calcined kaolin, Section IV of the proposed Final Judgment requires defendants to divest the Sandersville No. 1 water-washed kaolin plant of ECC, with an annual capacity of 850,000 tons, and to divest two calciners, with a minimum annual

capacity of 85,000 - 100,000 tons. Alternatively, defendants may at their option sell the DBK plant in Dry Branch, Georgia. This plant includes both a water-washed kaolin plant with capacity of slightly over one million tons, and a calcined kaolin plant.

In all cases, the plant divestiture requires divestiture of all tangible and intangible assets used in connection with those plants, and divestiture of sufficient kaolin reserves to operate the plant at full capacity for 20 years.

Currently, DBK has two plants: the DBK plant, and a 300,000 ton capacity plant in Jeffersonville, Georgia, which it acquired in 1997 when it purchased Nord Kaolin Co. The Jeffersonville plant is largely idled, except for the calcined plant at that location. The proposed transaction thus would give the combined company about 1 million tons more water-washed kaolin capacity than ECC had before the tender offer. Divestiture of the DBK plant would eliminate any increase in concentration in water-washed kaolin resulting from the acquisition. The Sandersville No. 1 plant is only slightly smaller than the DBK plant. In plaintiff's view, it is sufficiently close to DBK's stand-alone capacity that a purchaser of that plant could be an effective replacement for DBK in the market.

With respect to calcined kaolin, ECC currently has 4 calciners, with a total capacity of about 200,000 tons, making calcined kaolin for paper-making. DBK currently has 3 calciners, with a total capacity of about 105,000 tons, devoted to this product. Even after the required divestiture, the proposed transaction would result in some increased concentration in capacity for calcined kaolin for paper-making. From what plaintiff learned during the course of its investigation, however, the required divestiture should be sufficient for the purchaser to be a viable, effective new entrant into that market. Accordingly, plaintiff concluded that this

divestiture is likely to substantially mitigate any anticompetitive effects of the proposed transaction with respect to calcined kaolin for paper-making.

GCC for paper-coating

With respect to paper-grade GCC, Section IV of the proposed Final Judgment requires defendants to divest Georgia Marble's interest in the Alabama Carbonates limited partnership.[4] Pending divestiture of Georgia Marble's interest in Alabama Carbonates, the Hold Separate Stipulation and Order requires Imetal to resign its seats on the Alabama Carbonates Management Committee and to assign to its joint venturer its right to name committee members.

Section IV of the proposed Final Judgment also requires defendants to divest sufficient GCC reserves for Alabama Carbonates to operate at its maximum stated contractual capacity of 500,000 tons for 30 years. These reserves must be economically recoverable, located in the Sylacauga, Alabama area, and of minimum pureness quality suitable for paper-grade GCC. Defendants must divest these reserves to the purchaser of Georgia Marble's interest, to Omya, or to Alabama Carbonates.

The divestiture of reserves is designed to ensure that Alabama Carbonates will be able to operate independently of Georgia Marble. Currently, Alabama Carbonates relies on Georgia Marble for its raw material and for all dry processing of its feedstock. Such dependence on the company that, after the proposed transaction, will be its only competitor, raises obvious competitive problems. In order to operate independently the limited partnership must have its

[4]Under the provisions of the proposed Final Judgment, defendants must divest this interest to a purchaser or purchasers acceptable to the United States. Under the terms of the limited partnership agreement, however, Georgia Marble's joint venturer, Omya, has a contractual right to prior notice of any sale of the interest and a right to match any offer for that interest.

own reserves and its own processing facilities. The plaintiff concluded as a result of its investigation that 30 years' reserves was the minimum that the limited partnership would need to consider making the required investments in processing facilities.

The proposed Final Judgment permits defendants, in calculating the quantity of reserves required to be divested, to take into account any economically recoverable reserves Omya already owns, uses or has an option on in the Sylacauga area that are of suitable quality and are available to Alabama Carbonates. The proposed Final Judgment further provides that, if Alabama Carbonates, Omya, or the purchaser of Georgia Marble's interest in Alabama Carbonates cannot agree with the defendants (or with the trustee if the trustee is the seller) on the amount of GCC Reserves to be divested to provide 500,000 tons of feedstock for 30 years, or cannot agree on the fair market value of those reserves, they may submit those issues to binding arbitration. Section IX of the proposed Final Judgment sets forth the procedures to be followed in the event of such arbitration.

This provision for arbitration is designed to address two somewhat different concerns. First, defendants maintain that Omya already has extensive high bright GCC reserve holdings in the Sylacauga area and that Alabama Carbonates therefore does not need substantial additional reserves in order to be a viable independent competitor. As a result of its investigation, the United States disagreed and was unwilling to agree to a proposed settlement without a sufficient divestiture of GCC reserves to enable the joint venture to be a viable independent competitor. The arbitration provision permitted the parties to reach a settlement agreement that satisfies the United States' competitive concerns, while at the same time providing defendants with a

mechanism for assuring themselves that they are protected against an unnecessary sale of their reserves.

Second, given the contractual provisions of the Alabama Carbonates limited partnership agreement, there is a high likelihood that defendants will have no choice but to sell the GCC reserves to Omya. In such a situation, where there is a single buyer, the market forces that operate in a typical negotiation on price are absent. Defendants sought the option of arbitration to provide them a modicum of protection in their negotiations. There is precedent for this in other Antitrust Division consent decrees that have ordered divestiture to a particular buyer.

In addition to the divestiture provisions outlined above, Section IV of the proposed Final Judgment requires defendants, at the option of Alabama Carbonates, to supply the joint venture with feedstock for a period up to three years. This provision is designed to provide Alabama Carbonates with a reasonable transition period to make the investment required for it to be self-sufficient in the long term. The proposed Final Judgment further requires defendants to erect a firewall (Section VIII) during the term of any such supply contract, to ensure that no one at the combined Imetal/ECC with responsibility for paper-grade GCC receives any competitively sensitive information about Alabama Carbonates' requirements or purchases.

Fused Silica

Section IV of the proposed Final Judgment requires defendants to divest the fused silica plant of ECC, together with all tangible and intangible assets used in connection with the plant. This divestiture would eliminate any anticompetitive effects of the proposed transaction with respect to fused silica.

ECC acquired this fused silica plant within the last year when it acquired Minco. Minco also operates a fused magnesia plant, at the same location, that defendants wish to retain. The two plants are separate businesses and there is no overlap between ECC and Imetal with respect to fused magnesia, so retention of the fused magnesia businesses should not pose a problem under Section 7 of the Clayton Act. It may be, however, that the two plants together are more readily saleable than is the fused silica plant alone. For this reason, Section VI of the proposed Final Judgment provides that if the fused silica plant goes to a trustee for sale, the trustee may also sell the fused magnesia plant (together with all tangible and intangible assets used in connection with that plant).

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may

be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

J. Robert Kramer, II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, with respect to kaolin, simply requiring divestiture of the DBK plant. Divestiture of the DBK plant has two advantages over divestiture of the Sandersville No. 1 water-washed kaolin plant: (1) it would essentially put the purchaser in the same position as Imetal before the tender offer; and (2) unlike Sandersville No. 1, the DBK plant has been operated as a stand-alone business and has a clear track record as such.

The United States ultimately adopted the framework of the proposed Final Judgment, however, because it concluded that a divestiture of the Sandersville No. 1 plant could, under the proper circumstances, effectively redress the likely anticompetitive effects of the proposed transaction. During the course of the investigation, defendant ECC entered into pre-settlement negotiations and signed a preliminary Letter of Intent with Thiele Kaolin Company for the sale of the Sandersville No. 1 plant. A purchase by Thiele would cause higher concentration than would result if the Sandersville No. 1 plant were sold to a firm outside the kaolin industry. However, both defendants and Thiele argued that the additional capacity would permit Thiele to better compete for large paper customers against the two industry leaders. While the United States did not "pre-approve" a sale to Thiele -- the parties did not have a definitive agreement, and their Letter of Intent did not address at all some issues that would be important to plaintiff's evaluation of any proposed sale -- plaintiff concluded that a divestiture of the type contemplated in the Letter of Intent could satisfy the United States' competitive concerns with respect to water-washed kaolin. Plaintiff therefore concluded that defendants should be permitted to try to divest the Sandersville No.1 plant if they so chose.

The United States also considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Imetal and ECC. The United States is satisfied that the divestitures required by the proposed Final Judgment will facilitate continued viable competition in the four relevant product markets alleged in the Complaint and will effectively prevent the anticompetitive effects that the Complaint alleges would result from the proposed acquisition.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia Circuit held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). The

courts have recognized that the term "'public interest' take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," Northern Pacific Railway Co. V. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir.1983), cert. denied, 465 U.S. 1101 (1984); United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[5] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

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[5]119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D.Mass.1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. §16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). See also Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is 'within the reaches of the public interest.' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[6]

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a proposed final judgment

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[6] United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[7]

[7] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE DOCUMENTS

The only determinative document, within the meaning of the APPA, that was considered by the United States in formulating the proposed Final Judgment is the preliminary Letter of Intent between defendant ECC and Thiele Kaolin Company, a copy of which is attached as Exhibit A.

FOR PLAINTIFF UNITED STATES OF AMERICA:

Dated: May __, 1999.

Respectfully submitted,

_____/s/_____
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